

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 16, 2005

STATE OF TENNESSEE v. ROBERT K. WARD

Appeal from the Circuit Court for Sevier County
No. 9429 Rex Henry Ogle, Judge

No. E2004-01665-CCA-R3-CD - Filed December 29, 2005

JOSEPH M. TIPTON, J., concurring.

I concur in the results and most of the reasoning in the majority opinion. I disagree, though, with its view of the trial court's instructing the jury regarding an excited utterance. The hearsay rule of exclusion is mainly based upon concerns for the reliability of the asserted fact by an out-of-court declarant. See State v. Henry, 33 S.W.3d 797, 803 (Tenn. 2000). An excited utterance is an exception to the rule of exclusion because we believe it occurs under circumstances rendering it sufficiently reliable to be admitted into evidence. See State v. Gordon, 952 S.W.2d 817, 819-20 (Tenn. 1997). However, a trial court should not explain this to a jury because it is truly a comment relevant to the reliability of the evidence.

The trial court in the present case, though, stressed to the jury that they were to determine whether the statement was made to the witness and whether it was true. Given the defendant's failure to object, I believe the full instruction does not rise to the level of plain error.

JOSEPH M. TIPTON, JUDGE